Supreme Court of the United States

OCTOBER TERM, 1899.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,

Plaintiff in Error,

No. 271. *vs.*

BENJAMIN F. THIEBAUD, Administrator of Chris. Sweetman, Deceased,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Motion to Dismiss or Affirm.

Now comes defendant in error and moves the Court to dismiss the writ of error in the above entitled cause.

1. On the ground that the writ of error from this Court in this case was taken to the Circuit Court while the case was pending in the Circuit Court of Appeals for the Sixth Circuit on a writ of error theretofore sued out by the plaintiff in error to said Circuit Court, and the judiciary act of March 3, 1891, c. 517 (26 Stat., 826), does not contemplate several separate appeals or writs of error on the merits in the same case and at the same time to two appellate courts; and

2. On the ground that this Court is without jurisdiction in this case, for that the appellate jurisdiction of this Court is sought

to be maintained upon the single ground that the statute of Indiana under which the recovery was had in the Circuit Court is in violation of the Fourteenth Amendment of the Constitution of the United States, and that, therefore, the case is one in which it is claimed that the statute of a state is in contravention of the Constitution of the United States within the meaning of the judiciary act of March 3, 1891, c. 517, Sec. 5 (26 Stat., 826). But the record does not show that any such claim was made or such constitutional question was raised or decided at the trial of the case in said Circuit Court, or that any construction or application of the Constitution of the United States was expressed by the Circuit Court or asked for at the trial by defendant, or that any constitutional question was passed upon, dealt with or in any manner presented to said Circuit Court.

And defendant in error further moves the Court (and unites such motion with the foregoing motion to dismiss) to affirm the judgment of the Circuit Court herein on the ground that, although the record may show that this Court has jurisdiction, yet it is manifest from the record that the writ of error in this case was taken by plaintiff in error for delay only.

CHARLES M. CIST,
HARLAN CLEVELAND,
Attorney for Defendant in Error.